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Attorneys for Respondent
RICHARD FRENKEL

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ILLINOIS COMPUTER RESEARCH, LLC,
Plaintiff and Counterclaim Defendant,

vs.

FISH & RICHARDSON P.C.,
Defendant, Counterclaimant and Third
Party Plaintiff,

vs.

SCOTT C. HARRIS,
Third-Party Defendant, Counterclaimant,

vs.

FISH & RICHARDSON P.C.,
Defendant, Counterclaimant, Third
Party Plaintiff and Counterclaim
Defendant

Miscellaneous Action No.
CV 5:08-mc-80074-JF (HRL)

**DECLARATION OF CHARLES L.
BABCOCK, IV, IN SUPPORT OF
RICHARD FRENKEL'S PARTIAL
OPPOSITION TO *EX PARTE*
APPLICATION BY ILLINOIS
COMPUTER RESEARCH LLC AND
SCOTT C. HARRIS PURSUANT TO
LOCAL RULE 6.3 FOR ORDER
SHORTENING TIME FOR HEARING
ON MOTION OF ILLINOIS
COMPUTER RESEARCH LLC AND
SCOTT C. HARRIS UNDER
FED.R.CIV.P. 45 TO COMPEL
RICHARD FRENKEL'S DEPOSITION
AND DOCUMENT PRODUCTION IN
APRIL 2008**

1 I, Charles L. Babcock, declare and state as follows:

2 1. I am a partner with the law firm of Jackson Walker L.L.P. I am counsel for
3 Richard Frenkel ("Frenkel") and Cisco Systems, Inc. ("Cisco") (collectively, "Respondents") in
4 the above-referenced matter.

5 2. As counsel for Respondents, I notified Illinois Computer Research LLC and Scott
6 C. Harris (collectively, "Applicants") that Respondents would not insist upon the 35-day rule
7 contained in Local Rule 7-2(a) for Applicants' motion to compel if (i) a hearing date acceptable
8 to the Court and all counsel could be agreed upon and (ii) Frenkel's and Cisco's motion to quash
9 and for protective order could be heard at the same time. Counsel for Respondents, including
10 myself and George McWilliams, are available for hearing on April 22, 2008, the date requested in
11 the *ex parte* Application to Shorten Time.

12 3. April 22, 2008 is not one of the dates that Applicants' counsel and Respondents'
13 counsel discussed regarding agreed dates.

14 4. Attached as "Exhibit A-1" is a true and correct copy of ECF document No. 131,
15 the minute order granting Fish & Richardson, P.C.'s ("Fish") motion for leave to file an amended
16 counterclaim and third-party complaint in the above-entitled action pending in the United States
17 District Court for the Northern District of Illinois, Eastern Division, Case No. 07 C 5081 (the
18 "Chicago case").

19 5. Attached as "Exhibit A-2" is a true and correct copy of ECF document No. 114,
20 the minute order wherein the Court in the Chicago case warned that "[i]f proceeding with
21 depositions at this point is premature, and depositions must be reopened following the naming of
22 additional parties, Plaintiff's counsel will be required to pay the cost for the reopened
23 depositions."

24 6. Attached as "Exhibit A-3" is a true and correct copy of ECF document No. 58, the
25 minute order wherein the Court in the Chicago case set the discovery deadline as September 30,
26 2008.

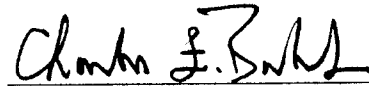
7. Attached as "Exhibit A-4" is a true and correct copy of *New Medium Technologies, L.L.C. v. Barco, N.V.*, No. C 07-80226 MISC JF (RS), slip op. (N.D. Cal. Sept. 27, 2007) (unpublished).

8. Attached as "Exhibit A-5" is a true and correct copy of *Silicon Graphics, Inc. v. ATI Technologies, Inc.*, No. C 07-80276 JF (RS), slip op. (N.D. Cal. Dec. 13, 2007) (unpublished).

9. Attached as "Exhibit A-6" is a true and correct copy of *Silicon Graphics, Inc. v. ATI Technologies, Inc.*, No. C 07-80283 JF (PVT), slip op. (N.D. Cal. Dec. 28, 2007) (unpublished).

10. I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 15, 2008.



Charles L. Babcock

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Attorneys for Respondent
RICHARD FRENKEL

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ILLINOIS COMPUTER RESEARCH, LLC,
Plaintiff and Counterclaim Defendant,

Miscellaneous Action No.
CV 5:08-mc-80074-JF (HRL)

vs.

PROOF OF SERVICE

FISH & RICHARDSON P.C.,
Defendant, Counterclaimant and Third
Party Plaintiff,

vs.

SCOTT C. HARRIS,
Third-Party Defendant and
Counterclaimant

vs.

FISH & RICHARDSON P.C.,
Defendant, Counterclaimant, Third
Party Plaintiff and Counterclaim
Defendant

CERTIFICATE OF SERVICE

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action. My business address is One Market St., Spear Tower, San Francisco, CA 94105.

On April 15, 2008, I served on the interested parties in said action the within document(s) as indicated on the attached service list:

DECLARATION OF CHARLES L. BABCOCK, IV, IN SUPPORT OF RICHARD FRENKEL'S PARTIAL OPPOSITION TO *EX PARTE* APPLICATION BY ILLINOIS COMPUTER RESEARCH LLC AND SCOTT C. HARRIS PURSUANT TO LOCAL RULE 6.3 FOR ORDER SHORTENING TIME FOR HEARING ON MOTION OF ILLINOIS COMPUTER RESEARCH LLC AND SCOTT C. HARRIS UNDER FED.R.CIV.P. 45 TO COMPEL RICHARD FRENKEL'S DEPOSITION AND DOCUMENT PRODUCTION IN APRIL 2008

☒ (Via Overnight Delivery – Federal Express) by placing the document(s) listed above in a sealed Federal Express envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a Federal Express agent for overnight delivery

☒ by transmitting **via facsimile** the document(s) listed above on this date.

☐ by causing the documents to be delivered by electronic mail addressed as set forth below.

☐ by causing the documents to be delivered by hand to the offices of the interested parties.

I declare under penalty of perjury, under the laws of the State of California, that the above is true and correct. Signed April 15, 2008, in San Francisco, California.



SERVICE LIST

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SCOTT C. HARRIS, Third Party
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**Attorneys for Respondent RICHARD
FRENKEL**

EXHIBIT A-1

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Rebecca R. Pallmeyer <i>RRP</i>	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	07 C 5081	DATE	4/8/2008
CASE TITLE	Illinois Computer Research, LLC vs. Fish & Richardson, P.C.		

DOCKET ENTRY TEXT

Ruling held. Fish & Richardson's motion for leave to file an amended counterclaim and third-party complaint [99] granted. Date to add additional parties and to amend pleadings extended to 5/21/2008. Status hearing set for 5/21/2008 at 9:00.

Docketing to mail notices.

00:21

Courtroom Deputy
Initials:

ETV

Exhibit A-1

EXHIBIT A-2

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Rebecca R. Pallmeyer <i>REP</i>	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	07 C 5081	DATE	3/4/2008
CASE TITLE	Illinois Computer Research, LLC vs. Fish & Richardson, P.C.		

DOCKET ENTRY TEXT

Motion hearing held. Scott Harris's and ICS's motion to proceed with discovery [103] granted. If proceeding with depositions at this point is premature, and depositions must be reopened following the naming of additional parties, Plaintiff's counsel will be required to pay the cost for the reopened depositions. Fish & Richardson P.C.'s renewed motion to compel production of documents [105] granted in part and denied in part without prejudice by agreement. Date for filing of Defendant's reply in support of motion for leave to amend [99] extended to 3/10/2008. Ruling date of 3/17/2008 stricken and reset to 4/8/2008 at 9:00.

Docketing to mail notices.

00:23

Courtroom Deputy Initials:	ETV
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EXHIBIT A-3

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Rebecca R. Pallmeyer <i>RRP</i>	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	07 C 5081	DATE	12/3/2007
CASE TITLE	Illinois Computer Research, LLC vs. Google Inc.		

DOCKET ENTRY TEXT

Rule 16 conference convened. Rule 26(a)(1) disclosures to be made by 12/14/2007. All discovery to be completed by 9/30/2008. Retained expert reports under Rule 26(a)(2): For all issues on which a party bears the burden of proof by 6/30/2008; rebuttal reports by 8/15/2008. Parties allowed to join additional parties and to amend pleadings by 3/31/2008. Parties have leave to take up to 15 depositions per side without further leave of court. Dispositive motions due by 10/31/2008. ICR and Harris to prepare proposed PTO draft by 1/30/2008; Joint Final Pretrial Order by 2/27/2009. Status hearing set for 2/5/2008 at 9:00.

Docketing to mail notices

00:09

Courtroom Deputy Initials:	ETV
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EXHIBIT A-4

E-FILED 9/27/07

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

NEW MEDIUM TECHNOLOGIES, LLC, et al.,

NO. C 07-80226 MISC JF (RS)

Plaintiff,

**ORDER DENYING MOTION TO
SHORTEN TIME**

v.

BARCO, N.V.,

Defendant.

This is a miscellaneous action brought to enforce a third-party deposition subpoena issued under the authority of this district in connection with an underlying patent infringement action pending in the Northern District of Illinois. Defendants Toshiba Corporation and Toshiba America Consumer Products LLC (collectively "Toshiba") move under Civil Local 6-3 for an order shortening time in which to brief and hear Toshiba's motion to compel the deposition of Jerry B. Torrance, Jr. Toshiba asserts the motion to compel must be heard and decided in sufficient time to permit the Torrance deposition to be complete prior to the October 19, 2007 discovery cut off in the underlying action.


Once a party has filed a timely motion to compel, the fact that the discovery cut off may pass before the motion is heard and decided in no way precludes the court from ordering the discovery to go forward, assuming the court concludes the motion to compel should be granted. Indeed, under the Civil Local Rules in this District, motions to compel may be filed up to seven court days *after*

1 the discovery cut off. That rule would be meaningless if the passing of the discovery cut off
2 somehow precluded the court from granting a motion to compel. See Civil Local Rule 26-2.¹

3 Toshiba has not identified any other exigent circumstances that would warrant hearing its
4 motion on shortened time. Accordingly, the motion to shorten time is DENIED. Toshiba's motion
5 to compel, filed on September 24, 2007, shall be heard on October 31, 2007, at 9:30 a.m. in
6 Courtroom 4. Toshiba shall give notice of this order to all parties.

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9 IT IS SO ORDERED.

10 Dated: 9/27/07


RICHARD SEEBORG
United States Magistrate Judge

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26 ¹ The Court need not decide how Rule 26-2 would apply where the local rules of another
27 district in an underlying action provided a different deadline for bringing motions to compel. There
28 is no dispute that the discovery cut off in the underlying case has not expired and that the motion to
compel is therefore timely.

1 **THIS IS TO CERTIFY THAT NOTICE OF THIS ORDER HAS BEEN GIVEN TO:**

2 Martha Corcoran Luemers eFilingPA@dorsey.com, luemers.martha@dorsey.com

3
4 Counsel are responsible for distributing copies of this document to co-counsel who have not
5 registered for e-filing under the Court's CM/ECF program.

6 **Dated: 9/27/07**

Chambers of Judge Richard Seeborg

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8 **By:** /s/ BAK

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United States District Court
For the Northern District of California

ORDER DENYING MOTION TO SHORTEN TIME
C 07-80226 MISC JF (RS)

EXHIBIT A-5

E-FILED 12/13/07

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

SILICON GRAPHICS, INC,

NO. C 07-80276 JF (RS)

Plaintiff,

**ORDER DENYING
"EMERGENCY" MOTION**

v.

ATI TECHNOLOGIES, INC, et al.

Defendants.

Plaintiff Silicon Graphics, Inc. ("SGI") initiated this miscellaneous proceeding to enforce a subpoena issued in this district in connection with an underlying proceeding pending in the Western District of Wisconsin.¹ SGI has filed what it terms an "emergency" motion to compel Acer to produce documents and a deposition witness no later than Saturday, December 15, 2007.² The motion is DENIED, without prejudice to SGI's right to seek relief by motion noticed on the full 35 days provided by Civil Local Rule 7-2 or SGI's right to seek to shorten time under Civil Local Rule 6-3.

SGI's contention that an "emergency" presently exists fails for at least two reasons. First, as

¹ The subpoena was served on Acer America, Corp., which SGI has erroneously named as the "defendant" in this proceeding. Acer is a third party, not a "defendant," even though the dispute in this miscellaneous action is between SGI and Acer.

² Neither the Federal Rules of Civil Procedure nor the Civil Local Rules in this district have any provision for an "emergency motion." Local Rule 6-3 governs procedures for seeking Court action on an expedited basis.

1
Exhibit

A-5

1 SGI acknowledges, the subpoena in dispute was served "over three months ago" and SGI and Acer
2 have been negotiating since that time. Meaningful "meet and confer" negotiations are always to be
3 encouraged, and the parties are commended for their apparent efforts in this case. Nevertheless, a
4 party may not create an "emergency" by failing to seek relief until a deadline is imminent.

5 More significantly, the "deadline" to which SGI points is only the general discovery cut off
6 in the underlying action. Where a motion to compel has been timely-filed, the existence of a
7 discovery cut off in no way divests the Court of the power to order the discovery in dispute to go
8 forward, assuming the Court concludes it is proper. There appears to be no dispute that SGI initiated
9 this miscellaneous action on a timely basis. Should the Court determine, on duly noticed motion,
10 that further response to the subpoena is appropriate, it can and will order such response without
11 regard to the discovery cut off.

12
13 IT IS SO ORDERED.

14 Dated: December 13, 2007



RICHARD SEEBORG
United States Magistrate Judge

1 **THIS IS TO CERTIFY THAT NOTICE OF THIS ORDER HAS BEEN GIVEN TO:**

2 ATI Technologies, Inc. tamiller@rkmc.com

3 Mitchell M. Blakely mblakely@morganlewis.com

4 Peter Collins McMahon peter@mcmahonserepca.com, peter@mcmahonlawgroup.com,
5 pmcmahon@pmcmahonlaw.com

6 Counsel are responsible for distributing copies of this document to co-counsel who have not
7 registered for e-filing under the Court's CM/ECF program.

8 **Dated: 12/13/07**

Richard W. Wicking, Clerk

9
10 **By: _____**
11 **Chambers**

United States District Court
For the Northern District of California

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28 **ORDER DENYING "EMERGENCY" MOTION**
C 07-80276 JF (RS)

EXHIBIT A-6

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

SILICON GRAPHICS, INC,
Plaintiff,
v.
ATI TECHNOLOGIES, INC, et al.
Defendants.

NO. C 07-80283 JF PVT

**ORDER DENYING MOTION TO
SHORTEN TIME FOR
"EMERGENCY" MOTION**

On December 13, 2007, Plaintiff Silicon Graphics, Inc. ("SGI") initiated this miscellaneous proceeding to enforce a subpoena issued in this district in connection with an underlying proceeding pending in the Western District of Wisconsin. The subpoena was issued on September 12, 2007 on Hewlett Packard Company ("HP") and called for production on September 25, 2007. SGI has filed what it terms an "emergency" motion to compel HP to produce documents and a deposition witness. SGI also filed Motion to Shorten Time. The basis of the "emergency" appears to be that discovery closed in the underlying proceeding on December 15, 2007.

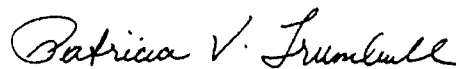
On December 11, 2007, SGI filed *Silicon Graphics Inc. v. ATI Technologies, Inc.*, 07-Misc-80276 and on December 12, 2007, SGI filed *Silicon Graphics Inc. v. ASUS Computer International*, 07-Misc-80279. Both miscellaneous proceedings arise out of the same underlying litigation as this proceeding. On December 13, 2007, Judge Seeborg denied the Emergency Motion to Compel in *Silicon Graphics Inc. v. ATI Technologies, Inc.*, 07-Misc-80276, finding that no true

1 emergency existed.¹ The motion to shorten time in this action is based on the same circumstances as
2 the motion already denied by Judge Seeborg and is denied for the same reasons. First, as SGI
3 acknowledges, the subpoena in dispute was served "over three months ago" and a party may not
4 create an "emergency" by failing to seek relief until a deadline is imminent. Second, and more
5 significantly, the "deadline" to which SGI points is only the general discovery cut off in the
6 underlying action. Where a motion to compel has been timely-filed, the existence of a discovery cut
7 off in no way divests the Court of the power to order the discovery in dispute to go forward,
8 assuming the Court concludes it is proper. There appears to be no dispute that SGI initiated this
9 miscellaneous action on a timely basis.

10 Accordingly, It Is Hereby Ordered that the Motion to Shorten Time is Denied.²

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12 IT IS SO ORDERED.

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14 Dated: December 28, 2007



PATRICIA V. TRUMBULL
United States Magistrate Judge

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24 ¹On December 14, 2007, SGI filed a motion to withdraw its motion to shorten time both
25 other miscellaneous actions.

26 ²On December 21, 2007, Judge Fogel issued an Order Relating the two prior miscellaneous
27 actions. Pursuant to SGI's Notice of Pendency of Other Action, Judge Fogel will be presented with
28 a Related Case Order. If Judge Fogel relates this action to the two prior actions, Judge Seeborg will
become the discovery judge in this matter and the motion to compel will be noticed on a proper day
for Judge Seeborg's law and motion calendar. If Judge Fogel does not relate the cases, the motion
will have to be renoticed to a Tuesday, Judge Trumbull's law and motion calendar day.